Supreme Court, U.S.
FILED
FEB 25 1994
OFFICE OF THE CLERK

(2)

No. 93-1228

In the

Supreme Court of the United States

October Term, 1993

PHILIP A. BURGHART,

Petitioner,

-against-

RALPH LANDAU, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

MOSES SILVERMAN
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Attorneys for Respondents

Of Counsel:
EDWARD N. COSTIKYAN
DAVID L. KORNBLAU
ERIC R. DINALLO

February 24, 1994

18 pp

Questions Presented

1. Whether the court of appeals correctly declined to review the merits of plaintiff's motion to disqualify the district judge, where:

(a) plaintiff had withdrawn the motion in the district court four days after filing it in November 1982;

(b) plaintiff's purported "newly discovered" grounds for judicial disqualification were based on 16-year-old (and older) newspaper articles that were of public record long before plaintiff had filed his recusal motion in the district court, were asserted for the first time on appeal, and added nothing of relevance or substance to his previously withdrawn recusal motion; and

(c) consideration of the recusal issue could have had no bearing on the disposition of the appeal, since the court of appeals held that the entire action had been correctly dismissed on motion as a matter of law.

2. Whether the court of appeals correctly refused to review the district court's decision to "decline" plaintiff's 1991 "suggestion" of recusal alleging bias in the judge's conduct of the litigation, where no motion on this ground had been made or decided in the district court, and where consideration of plaintiff's "suggestion" could not have affected the appeal's outcome.

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iii

Rule 29.1 Statement 1

Opinion Below 1

Additional Rules Involved 1

Counterstatement of the Case 2

Nature of the Case 2

Burghart's 1982 Recusal Motion 4

Burghart's 1991 "Suggestion" of Recusal 8

The Decision Below 9

Argument

I. THE PETITION RAISES NO ISSUE WORTHY OF REVIEW 10

II. SANCTIONS SHOULD BE IMPOSED ON PETITIONER AND/OR HIS COUNSEL 12

Conclusion 13

TABLE OF AUTHORITIES

Page(s)

CASES

Hamm v. *Members of the Board of Regents*, 708 F.2d 647 (11th Cir. 1983) 11

Hatch v. *Reliance Ins. Co.*, 474 U.S. 1048 (1986) 12

Hyde v. *Van Wormer*, 474 U.S. 992 (1985) 12

Liljeberg v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988) 10-11

Murphy v. *American Home Prods. Corp.*, 448 N.E.2d 86 (N.Y. 1983) 2

Tatum v. *Regents of the Univ. of Nebraska-Lincoln*, 462 U.S. 1117 (1983) 12

United States v. *Anguiano*, 873 F.2d 1314, 1319 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989) 11

United States v. *Bosch*, 951 F.2d 1546 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2975 (1992) 11

United States v. *Murphy*, 768 F.2d 1518 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986) 11

Page(s)

United States v. *Schreiber*, 599 F.2d 534 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979) 11

STATUTES AND RULES

28 U.S.C. § 144 4

28 U.S.C. § 455(a) 2, 4

28 U.S.C. § 1927 12

Fed. R. Civ. P. 60(b)(6) 10

Sup. Ct. Rule 42.2 12

No 93-1228

In the

Supreme Court of the United States

October Term, 1993

PHILIP A. BURGHART,

Petitioner,

-against-

RALPH LANDAU, *et al.*,

Respondents.

Rule 29.1 Statement

Respondents include the following corporations: Halcon International, Inc.; Halcon SD Group, Inc.; Arell Corporation; and Citibank, N.A., as executors and trustees under the will of Harry A. Rehnberg.

The first three of these corporations have been dissolved. Citicorp is the parent company of Citibank, N.A.

Opinion Below

The court of appeals' unpublished order unanimously affirming the district court's dismissal of this action as a matter of law is reprinted as Appendix A to the petition. (1a–18a)

Appendix B to the petition (19a–36a) is a transcript of the 1982 district court hearing in which the district court noted, and plaintiff's counsel confirmed, that plaintiff had withdrawn the recusal motion that is the subject of his certiorari petition. (26a, 35a)

Additional Rules Involved

This case involves the following rules in addition to 28 U.S.C. § 455(a), which is quoted in the petition:

1. Rule 60(b), Fed. R. Civ. P., which provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

2. Rule 42.2 of this Court, which provides:

> When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or against the party's attorney or against both.

Counterstatement of the Case

Nature of the Case

This is a strike suit. It was brought under the district court's diversity jurisdiction by petitioner Philip Burghart against his former employer, defendant Halcon International, Inc., its directors, and others shortly after Burghart was fired in March 1982. Burghart had previously signed an agreement expressly abrogating his prior employment contracts and thus was dischargeable at will under black-letter New York law.[1/] He nonetheless claimed damages for wrongful discharge. Burghart also asserted four state-law damages claims based on his participation in Halcon's employee stock purchase program—even though his $1,860 cash

---

[1/] *See, e.g., Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 89 (N.Y. 1983).

investment in Halcon stock in 1970 and 1975 had already netted him a profit of over $455,000. (Subsequent distributions lifted his profit to over $625,000—a 33,727% return.) (4a–7a)

Over defendants' strenuous objections, the district judge (Lowe, J.) gave Burghart considerable leeway to pursue his frivolous, though complex, theories. Although she dismissed his wrongful discharge claim and two of his other claims at the outset, Judge Lowe permitted him to take discovery on his two remaining state-law claims (3 and 4). (Defendants declined to take any discovery.) Judge Lowe even granted Burghart leave to amend his complaint to add three federal securities-law claims, which largely reasserted his previously dismissed state-law claims in federal garb. (9a)

In time, however, Judge Lowe dismissed all of Burghart's claims—as a matter of law—either for failure to plead a cause of action or on summary judgment. The court also denied—again as a matter of law—Burghart's motion to reargue his dismissed securities claims and for leave to amend his complaint to add a frivolous and belated RICO treble-damages claim. (3a, 9a–11a)

Burghart appealed. In arguing that dismissal of the action should be upheld, defendants pointed out to the court of appeals, among other things, that Burghart's counsel had deceptively used an ellipsis in his appellate brief to conceal crucial contractual language in order to make one of his frivolous arguments appear plausible. At oral argument of the appeal, the presiding judge (Winter, J.) chastised Burghart's counsel for his lack of candor with the court. The very next day, the Second Circuit issued an unpublished 10-page order thoroughly analyzing the district court's dismissal of the action and affirming it in all respects. Burghart sought neither reargument nor *en banc* rehearing of the panel's decision.

Burghart's certiorari petition does not challenge the Second Circuit's holding that he has no case as a matter of law. Nor does it contend that any judge of that court should have been disqualified in this matter. Accordingly, he has waived any objection to the dismissal of his action on the merits. Instead, Burghart's petition focuses exclusively on a sideshow—his aborted and utterly frivolous effort to disqualify Judge Lowe.

Burghart's 1982 Recusal Motion

On November 8, 1982, shortly after the case was reassigned to Judge Lowe (because the original judge had disqualified himself), Burghart filed a recusal motion pursuant to 28 U.S.C. §§ 144 and 455(a) alleging that "a possibility of bias or prejudice might exist in favor of" defense counsel (Edward N. Costikyan) based on speculation that Judge Lowe was in essence beholden to him for her judicial position. (20a–24a)

The sole evidentiary support for the motion was an affidavit submitted by Burghart's counsel (Richard DeY. Manning). Purporting to quote from a November 1977 *New York Times* article (not attached to plaintiff's motion papers), Mr. Manning stated in his affidavit that Judge Lowe had been elected to the *state* bench with "'the backing of Governor Carey and the support of the Regular Democratic Organization and the new Democratic coalition.'" (22a) Mr. Manning's affidavit continued:

> 9. The connection of Edward N. Costikyan, Esq. with the "Regular Democratic Organization" (formerly known as "Tammany Hall") is quite well known in New York City.
>
> 10. I cannot state as to what role, if any, Edward N. Costikyan, Esq. played in the election of Judge Mary Johnson Lowe to the New York State Supreme Court; only the insiders in the "Regular Democratic Organization," Mr. Costikyan and Judge Lowe (and possibly a few others) might have knowledge of that.
>
> 11. However, in view of Mr. Costikyan's well known and highly respected position in the "Regular Democratic Organization," I believe that Judge Mary Johnson Lowe could not have been elected with the backing of the "Regular Democratic Organization" had Mr. Costikyan not been a strong supporter of Judge Lowe.
>
> 12. Inasmuch as Judge Lowe's appointment to the Federal District Court followed so

> closely upon her election to the State Supreme Court, one must reasonably conclude that those who helped her in her election to the State Supreme Court were also in some substantial degree responsible for her appointment to the Federal District Court.

(22a–24a)

Two days after the motion was filed, Mr. Costikyan filed an affidavit categorically denying that he had played any role in Judge Lowe's appointment to the bench. Mr. Costikyan's affidavit stated in full:

> 1. I am a partner in the firm of Paul, Weiss, Rifkind, Wharton & Garrison, attorneys for defendants. I make this affidavit in opposition to the motion of plaintiff's counsel that the court recuse itself.
>
> 2. I am very much afraid that Mr. Manning accords me far too much. While I was once, some 18 years ago, active in the democratic party of this County and City, I have had no connection with either the regular or irregular democratic party for many many years. *I played no role whatever in the election of Judge Lowe to the State Supreme Court, in Senator Moynihan's recommendation of her for appointment to the United States District Court or in her appointment to that position.*
>
> 3. Not only have I had no position in the democratic party, for the last five years as a member and later chairman of the Judiciary Committee of the Association of the Bar, I have been barred from any political activity whatsoever in the judicial area.
>
> 4. While I agree with Mr. Manning that reassignment of the case would not, in its present

posture, be detrimental to the interest of either plaintiff or defendants, since the factual premise on the basis of which reassignment is sought is wholly unfounded, there is simply no occasion for a recusal.

(25a-26a; emphasis added)

Two days later, having seen his speculative theory shattered, Burghart's counsel *withdrew* the motion. (27a)

At a hearing in December 1982, Judge Lowe took the opportunity to "set the record straight" regarding the withdrawn recusal motion:

> THE COURT: I will state for the record that I was appointed by Mayor Lindsay in December of 1971. I don't know whether Mayor Lindsay at that time was a republican or a democrat, because politics had never interested me.
>
> I was not a product of the Regular Democratic Organization, whatever you may mean by that, Mr. Manning.
>
> I served as a Criminal Court Judge from January 1972, when I was appointed, and I was selected by the Supervising Judge of New York City, who was then Mr. Justice David Ross. I served as an acti[ng] Supreme Court Justice by appointment of the Administrator from 1973 until I was elected to the Supreme Court in 1977.
>
> I was not a candidate of the Regular Democratic Organization at that point.
>
> I was shocked when I read the scurrilous remarks of yours, Mr. Manning, and I felt that it was just absolutely necessary, since an accusation was made that could hardly be withdrawn, that we set the record straight.
>
> I tell you now that the fact that Mr. Costikyan is an attorney in this case has

absolutely nothing to do with my decision in this case—and perhaps I had better ask Mr. Costikyan at this time:

Mr. Costikyan, do you know me personally?

MR. COSTIKYAN: No, your Honor, I never met you in these many years that you were active on the bench, and this is the first time that I think I have seen you.

THE COURT: And I will support that statement that I have never spoken to Mr. Costikyan, nor had any dealings whatsoever with Mr. Costikyan, and when I walked into this court this morning, this is the first time that I had ever seen Mr. Costikyan to know who he is. . . .

(32a-34a)

Time has demonstrated Judge Lowe's wisdom in putting these facts on the record despite Burghart's withdrawal of the motion. Her statements, and those in Mr. Costikyan's affidavit, remain undisputed. Yet nearly twelve years later, notwithstanding the withdrawal, Burghart is still seeking to pursue the very same unfounded accusations.

In the Second Circuit (as in his petition here), Burghart claimed that he had learned the "true facts" regarding this issue only last year, when his counsel, while working on his appeal, discovered "by sheer fortuity" a 1984 autobiography by former New York City Mayor Ed Koch and a slew of *New York Times* articles concerning Mr. Costikyan's brief 1977 mayoral campaign and Judge Lowe's judicial nominations and elections dating from the early 1970s. (Pet. 23-29 & nn.15-20) Burghart did not make any attempt to present these extra-record materials to the district court; he simply cited them in his Second Circuit brief.

Burghart has never contended (nor could he) that any of these belatedly discovered news reports establishes that Mr. Costikyan played *any* role in Judge Lowe's elevation to the state or federal bench—the only factual issue relevant to Burghart's

recusal motion. Notwithstanding Burghart's counsel's speculation and innuendo, the undisputed fact of the matter, as confirmed by both Mr. Costikyan and Judge Lowe on the record, is that Mr. Costikyan played no such role—and accordingly that there was no reason for Judge Lowe to step aside.

Lacking any factual basis for his disqualification effort, Burghart resorted in the court of appeals (as he does in this Court) to irrelevant, *ad hominem* attacks on defense counsel. He accuses Mr. Costikyan of having filed an affidavit containing a statement that was "at best, disingenuous, and, at worst, a blatant falsehood." (Pet. 28-29) This charge, like Burghart's recusal motion and indeed his entire lawsuit, is baseless. The statement in question, that Mr. Costikyan had "had no connection with either the regular or irregular democratic party for many many years" (25a), was fully accurate. As was widely reported, Mr. Costikyan had briefly sought the Democratic nomination as a mayoral *candidate* five years earlier, but he had held no *position* with the party for some eighteen years. In fact, a position with the party was the only sort of "connection" that could conceivably have had any relevance to Burghart's motion, since it was party officials (not mayoral candidates) who made judicial nominations.

Burghart's 1991 "Suggestion" of Recusal

In 1991, at the district court's invitation, defendants renewed their summary judgment motion on the only two claims remaining in the case (claims 3 and 4). In response, Burghart filed a brief in which he "decline[d] to take issue with" defendants' motion, but "suggested" (without filing an affidavit or motion) that Judge Lowe recuse herself on the basis of Burghart's "belie[f]" that the outcome and timing of her decisions had been "motivated not by the facts of the case or the applicable law but by what the Court incorrectly perceived nine years ago as a personal attack upon the integrity of the Court." (Pet. 31, 32)

This "suggestion" was just as frivolous as Burghart's 1982 recusal motion. Far from reflecting bias, the court's legal rulings painstakingly and dispassionately reviewed Burghart's convoluted

theories in five opinions spanning 87 pages and rejected them on their merits (correctly, as the Second Circuit later ruled).

Nor was Judge Lowe to blame for the fact that Burghart had dragged out his frivolous lawsuit for nine years (now almost twelve). Over and over again, he bombarded her with prolix and confusing motion papers (both in opposition to defendants' motions and in support of his own) that made his complex claims almost incomprehensible. She patiently waded through all of them. On two occasions, Judge Lowe even set a trial date for two of Burghart's claims. Defendants were prepared to go forward, but Burghart found a way to avoid trial. On the eve of both trials, he filed frivolous motions to reassert previously dismissed state-law claims by dressing them up in new but equally deficient federal-law theories. The trial dates were derailed so Judge Lowe could consider *Burghart's* motions. Then he blamed Judge Lowe for having denied him his "day in court for too long." (Pet. 31)

Judge Lowe succinctly "declined" Burghart's "suggestion of recusal" last year in her opinion granting defendants' renewed motion for summary judgment on Burghart's last two remaining claims.

The Decision Below

Burghart attempted to raise both his withdrawn 1982 judicial disqualification motion and 1991 "suggestion" on appeal. The court of appeals declined to review these matters in its unpublished order. After exhaustively discussing and affirming the district court's conclusion that Burghart's entire action failed as a matter of law, the Second Circuit observed:

> Burghart's final argument is that Judge Lowe should have recused herself because of alleged political connections between herself and appellees' counsel. Burghart may not raise this issue on appeal as he withdrew his motion for recusal four days after he filed it in 1982. Burghart attempted to reassert this argument through a "suggestion" that Judge Lowe recuse herself made in

1991. A Judge's refusal to accept a litigant's "suggestion" does not constitute an appealable order.

(17a–18a)

Argument

I.
THE PETITION RAISES NO ISSUE WORTHY OF REVIEW

Certiorari should be denied for the following reasons:

1. The questions prevented for review are moot.

The petition seeks certiorari only with respect to Burghart's claim that the district judge should have been disqualified. It does not challenge the court of appeals' holding that Burghart's entire action lacks merit as a matter of law. Accordingly, the outcome of this case—dismissal—would be unchanged by any ruling this Court might make on the recusal issue.

2. The Second Circuit's decision is fully consistent with the decisions of this Court.

Burghart argues that the Second Circuit's refusal to consider his withdrawn 1982 recusal motion conflicts with *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). (Pet. 51) That decision, however, clearly *supports* the decision below. In *Liljeberg*, the Court held that a litigant who discovers grounds for disqualification of a trial judge after judgment has been entered may, in certain circumstances, seek a new trial by filing a motion *in the district court* pursuant to Fed. R. Civ. P. 60(b)(6). Nothing in *Liljeberg* requires a court of appeals to review the merits of a recusal motion that, as here, was withdrawn below. And to the extent Burghart contends that his counsel uncovered "new grounds" for recusal while preparing his appeal, under *Liljeberg* he was obliged to bring them to the attention of the district court in a Rule 60(b)(6) motion. He did not. Accordingly, none of the articles on which he relied in the court of appeals were even in the record.

Moreover, in *Liljeberg*, this Court noted, "Of particular importance, this is not a case involving neglect or lack of due diligence [by the party seeking recusal] . . . ." 486 U.S. at 863 n.11. The disqualifying conflict there "was not a matter of public record at the time the case was tried and decided." *Id.* at 864 n.11. Here, in sharp contrast, Burghart did not exercise due diligence. All of the newspaper articles he cites were published years before he made, and then withdrew, his recusal motion.

3. The decision below does not conflict with any other circuit court decision.

No other circuit court of which we are aware has considered whether the merits of a withdrawn judicial disqualification motion should be considered on appeal. We are confident, however, that any circuit court would have reached the same result that the Second Circuit did on the facts and circumstances of this case.

For example, several circuits review, under a "plain error" standard, recusal issues raised for the first time on appeal. *See, e.g.*, *United States* v. *Bosch*, 951 F.2d 1546, 1548-49 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 2975 (1992); *United States* v. *Murphy*, 768 F.2d 1518, 1541 (7th Cir. 1985), *cert. denied*, 475 U.S. 1012 (1986); *Hamm* v. *Members of the Board of Regents*, 708 F.2d 647, 651 (11th Cir. 1983); *United States* v. *Schreiber*, 599 F.2d 534, 535-36 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979). Under such review, the appellate court will reverse only if "'the error was highly prejudicial and there was a high probability that the error materially affected the verdict.'" *Bosch*, 951 F.2d at 1548 (quoting *United States* v. *Anguiano*, 873 F.2d 1314, 1319 (9th Cir.), *cert. denied*, 493 U.S. 969 (1989)).

If this standard were applied here (even though Burghart's withdrawn recusal motion was *not* raised for the first time on appeal), no "plain error" could be found because (among other reasons), as the Second Circuit ruled, Burghart's action was correctly dismissed on the merits as a matter of law.

4. The unpublished order below sets no general legal standard and will not serve as a precedent in other cases.

The Second Circuit directed that its judgment "will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court." (18a) Moreover, the issues presented—the reviewability of a withdrawn judicial disqualification motion and of a declined "suggestion of recusal"—are not likely to recur.

5. Burghart's recusal motion and "suggestion" were frivolous.

Burghart has absolutely failed to make out any case for judicial disqualification, even considering his old newspaper articles that are not in the record. Thus, it would be pointless for this Court to continue this case in order to consider a completely meritless (as well as moot) argument.

6. This is a particularly inappropriate case for certiorari review because, as we believe is clear from the petition, the Court may not rely on petitioner to present a clear, concise, and accurate picture of the facts and issues below.

II.
SANCTIONS SHOULD BE IMPOSED ON PETITIONER AND/OR HIS COUNSEL

Burghart's petition is frivolous. It seeks review of an unpublished order on issues that are wholly irrelevant to the outcome of the case. Its principle strategy is to make *ad hominem* attacks on the district judge and defense counsel. The entire action has been an abusive 12-year escapade, inflicting a tremendous burden and significant expense not only on the defendants, but on the district court, the court of appeals, and now this Court as well.

We understand that this Court rarely imposes sanctions on litigants or their counsel who file frivolous certiorari petitions, but it unquestionably has the power to do so. *See* Sup. Ct. R. 42.2; *Hatch* v. *Reliance Ins. Co.*, 474 U.S. 1048 (1986); *Hyde* v. *Van Wormer*, 474 U.S. 992 (1985); *Tatum* v. *Regents of the Univ. of Nebraska-Lincoln*, 462 U.S. 1117 (1983); *see also* 28 U.S.C. § 1927.

We respectfully submit that this is one of the rare cases in which this Court should impose sanctions as a matter of deterrence, fairness, and justice.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied, and sanctions should be imposed on petitioner and/or his counsel.

Dated: February 24, 1994

Respectfully submitted,

MOSES SILVERMAN
Counsel of Record
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000
Attorneys for Respondents

Of Counsel:
EDWARD N. COSTIKYAN
DAVID L. KORNBLAU
ERIC R. DINALLO